U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	DECISION OF THE
vs.	COMMANDANT
	ON APPEAL
MERCHANT MARINER'S LICENSE NO. 260122 AND MERCHANT MARINER'S DOCUMENT NO. 113-44-5192-D2	NO. 2557
Issued to: Gary A. FRANCIS, Appellant.	

This appeal has been taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated November 19, 1991, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana revoked Appellant's license and merchant mariner's document, upon finding a use of dangerous drugs charge proved. The single specification supporting the charge alleged that, on or about January 28, 1991, Appellant was tested and found to be a user of a dangerous drug, to wit, tetrahydrocannabinol.

The hearing was held at New Orleans, Louisiana on November 6, 1991. Appellant waived his right to representation by professional counsel and appeared on his own behalf, pro se.

Appellant entered an answer of "no contest" to the charge and specification. The Investigating Officer introduced six exhibits into evidence, and the Appellant made unsworn statements on his own behalf. Appellant also produced a document related to his participation at a drug rehabilitation program. Portions of that document were read and discussed on the record.

The Administrative Law Judge found the charge and supporting specification proved by the Investigating Officer's exhibits and the Appellant's answer of "no contest." On November 19, 1991, the Administrative Law Judge issued a written decision and order revoking all licenses and documents issued to Appellant.

After timely notice, Appellant, through professional counsel, submitted a completed appeal in accordance with 46 C.F.R. § 5.703(c). Therefore, this matter is properly before the Commandant for review.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned license and document issued by the U. S. Coast Guard. Appellant's license authorized service as operator of mechanically propelled passenger-carrying vessels of not more than 25 gross tons on waters other than oceans and coastwise (excepting waters subject to the 1972 International Regulations for Preventing Collisions at Sea). The merchant mariner's document authorized Appellant to serve as able seaman unlimited, wiper, steward's department (food handler), and tankerman Grade A and all lower grades.

On January 27, 1991, Appellant fell while on a dock and broke his ankle. The next day, as part of his employer's post accident drug testing program, the Appellant provided a urine sample for drug screening. That specimen tested positive for marijuana metabolite, i.e., tetrahydrocannabinol.

On July 1, 1991, an Investigating Officer from the Coast Guard served on the Appellant the above mentioned charge of use of a dangerous drug and the one supporting specification.

During the hearing on November 6, 1991, the Appellant represented himself. After the Administrative Law Judge found the charge and specification proved by the Appellant's no contest answer and the Coast Guard's documentary evidence, the Appellant spoke on his own behalf. The Appellant also provided the Administrative Law Judge with a document indicating participation in a twelve week, State of Louisiana drug rehabilitation program. This document was not marked for identification or entered into the record, although parts of it were read by the Administrative Law Judge in open court. (TR 41-42). The document indicated that, as part of Appellant's rehabilitation program, there were ten urine screen tests; the first of these being on July 15, 1991, indicating a positive result, and the remaining nine screens indicating negative results. Appellant's document also contained the following recommendation: "Return to employment with continued psychotherapy, focusing on substance dependence, alcohol and drug screening at random intervals."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Adminstrative Law Judge revoking Appellant's license and merchant

mariners document. The Appellant does not contest the Administrative Law Judge's conclusion that the charge and specification were proved. However, he contends that satisfactory proof of "cure" was shown, and on appeal, raises the following arguments:

(1) The Administrative Law Judge's decision was arbitrary, capricious, clearly erroneous and unsupported by the law.

(2) The Administrative Law Judge erred in not requiring the testimony of the Medical Review Officer at the hearing.

(3) The Administrative Law Judge erred in not continuing the hearing until the Appellant could show further proof of cure.

(4) The revocation of Appellant's license was a violation of his due process rights.

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OPINION

I

A

The Appellant correctly recognizes that Administrative Law Judge decisions which are arbitrary, capricious or clearly erroneous and unsupported by the law will be overturned on appeal. Appellant asserts that the Administrative Law Judge's decision must be overturned because he mechanically applied the law without consideration of the Appellant's "ample evidence of cure." I disagree.

Title 46 U.S.C. § 7704(c) states: "If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the

license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."[1] To this end, the Appellant stated that while in the hospital on January 27, 1991, he had smoked marijuana because some fellow hospital patients had advised him that doing so would ease the pain of his broken ankle. [Transcript (TR) at 31]. Appellant stated that he had made a mistake in smoking marijuana and that he would not do it again, and provided evidence of his participation in a twelve week State of Louisiana rehabilitation program. As previously indicated, the document contained the recommendations that Appellant "return to employment with continued psychotherapy, focusing on substance dependence, alcohol and drug screening at random intervals" and that Appellant's future therapist assess him for Anti-abuse (disulfiram) therapy. [TR at 40-42; Decision & Order (D&O) at 3-4].

The Appellant and the Administrative Law Judge disagreed on the apparent meaning of the recommendations. The Appellant contended then, and contends now on appeal, that the recommendations only evidenced alcohol dependence. As indicated on the record, the Administrative Law Judge declined to interpret the recommendations so that only alcohol dependence was inferred. [TR at 42-43]. The Appellant argued this point with the

Administrative Law Judge but produced no evidence to corroborate his contention.

As the trier of fact, it is the Administrative Law Judge's duty to interpret or assess the evidence before him. Unless the Administrative Law Judge's interpretation is clearly erroneous, it will not be overturned on appeal. Appeal Decisions Nos. 2452 (MORGRANDE), 2332 (LORENZ). I find that the Administrative Law Judge's interpretation was a logical interpretation and not clearly erroneous. Therefore, I will not overturn it.

B

The Appellant also urges that the Administrative Law Judge's decision was arbitrary and capricious in that the Administrative Law Judge did not state what proof of cure was necessary. Consequently, the Appellant argues he can never show cure. This argument is without merit. Prior to my decision in Appeal Decision No. 2535 (SWEENEY), rev'd on other grounds sub nom. Commandant v. Sweeney, NTSB Order No. EM-152 (1992), it was left to the sound discretion of the Administrative Law Judge to find cure, or lack thereof, from the use or addiction to dangerous drugs for the purposes of 46 U.S.C. § 7704(c). See also, Appeal Decisions Nos. 2401 (CAVANAUGH), 1037 (ADAMS), 1457 (KOZAITES).

Since each case is evaluated on its own merits and requires careful analysis of the facts, it was not incumbent on the Administrative Law Judge to announce during the hearing the specific criteria that must be shown to prove cure. Moreover, cure has been generally defined in prior Decisions on Appeal or

Review. See, Commandant Decision on Review No. 5 (CUFFIE) (cure means "proper medical care for a reasonable length of time"). Here, the Appellant failed a urinalysis test on July 15, 1991, at the beginning of his State of Louisiana rehabilitation program, approximately 16 weeks before the Appellant's hearing. Additionally, while the Administrative Law Judge did not specify criteria that the Appellant should meet to show proof of cure, the record intimates what other evidence the Appellant should have offered to prove cure. The Administrative Law Judge noted in his Decision and Order that there was no evidence of compliance with 46 C.F.R. § 16.370(d). This regulation states:

> Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO shall determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual shall agree to be subject to increased, unannounced testing for a period as determined by the MRO of up to 60 months.

Since the criteria in Sweeney were issued after this case was heard, they did not have to be applied here. However, to the extent the Administrative Law Judge relied on 46 C.F.R. § 16.370(d) and the aforesaid decisions, his requirements were less stringent than the Sweeney standard[2]. Therefore, the proof

required by the Administrative Law Judge was not unreasonable. As Appellant did not present evidence that met any existing standards, the Administrative Law Judge's decision was not arbitrary, capricious, or clearly erroreous.

II

The Appellant urges that the Administrative Law Judge erred in not requiring the testimony of the Medical Review Officer at the hearing. The Appellant raises this argument because the Coast Guard Investigating Officer had pointed out that the Appellant's evidence of his rehabilitation program had not been reviewed by a Medical Review Officer and because the Administrative Law Judge applied the requirements of 46 C.F.R.
§ 16.370(d) to his criteria of cure. This argument is without merit as it removes the burden to show satisfactory proof of cure from the Appellant.

Title 46 U.S.C. § 7704(c) provides for mandatory revocation of a license or document "unless the holder provides satisfactory proof that the holder is cured." (Emphasis added.) While the Coast Guard has the burden to prove that a seaman is a user of or addicted to the use of dangerous drugs, the burden of persuasion to show satisfactory proof of cure falls squarely upon the seaman. Appeal Decision No. 2401 (CAVANAUGH). It was incumbent upon the Appellant, not the Investigating Officer or the Administrative Law Judge, to provide evidence via the testimony

of the Medical Review Officer or by any admissible evidence that would support Appellant's assertion of cure.

III

Alternatively, the Appellant argues that the hearing should have been continued until the Appellant could show further proof of cure. I agree that the Administrative Law Judge could have continued the hearing to allow the Appellant additional time to show proof of cure. However, it was not error for the Administrative Law Judge to have not ordered a continuance on his own motion.

In support of his argument, the Appellant cites Decision of the Vice Commandant on Review No. 18 (CLAY). Clay was a review of the first case applying the standards articulated in Sweeney, supra. Clay held that where a respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an accepted rehabilitation program, the Administrative Law Judge may grant a continuance. See also,
46 C.F.R. § 5.511; Appeal Decisions Nos. 2389 (COLLA), 2182 (WILLIAMS) (continuances are given at the discretion of the Administrative Law Judge). However, as noted in Section I of this decision, the Sweeney case was not available to the Administrative Law Judge at the time of this hearing. Neither was Clay. Moreover, the Appellant did not ask for a continuance. Accordingly, it was not clear error on the part of the Administrative Law Judge not to order a continuance sua sponte.

IV

The Appellant further contends that revocation of his license was a violation of his due process rights under the Fifth Amendment to the U.S. Constitution. Specifically, the Appellant argues that he did not have the opportunity to be fairly heard on the issue of cure because "the parameters of 'cure' are undefined."

These proceedings are governed by statute and regulations and are intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 U.S.C. § 7701;
46 C.F.R. Part 5. Those regulations detail the authority of the Administrative Law Judge at the hearing level and the Commandant of the Coast Guard at the administrative appellate level. Neither the Administrative Law Judge, nor I, as Commandant, are vested with authority to decide constitutional issues. That is exclusively within the purview of the federal courts. See, 4 Davis, Administrative Law Treatise, § 26.6 (1983); Appeal Decisions Nos. 2433 (BARNABY) and 2202 (VAIL).

As per Section I of this opinion, it was within the sound discretion of the Administrative Law Judge to make a finding of whether Appellant had shown cure based on all of the evidence presented. Appellant appears to argue that if he only had a better knowledge of what it took to show cure, he would have introduced that additional evidence. This argument is not well taken. The suspension and revocation procedures specified in
46 C.F.R. Part 5 are in full consonance with the Administrative Procedure Act requirements set forth in 5 U.S.C. §§ 551-559 and

adequately afford the "opportunity to be heard." Appeal Decision No. 2477 (BLAKE) aff'd sub nom Commandant v. Blake, NTSB Order EM-156 (1989). Appellant was provided the opportunity to present all relevant evidence of cure, and cannot now be heard to say that he would have presented more evidence of cure if he had been presented a defined standard of cure. He apparently offered the evidence he had and unsuccessfully argued for it to be interpreted in his favor. Similarly, here, his evidence and arguments have been considered. Further, Appellant has never indicated that any other evidence actually existed, which, if offered at the hearing, would have been relevant to the issue of cure. Therefore, he has not been denied a fair opportunity to be heard.

V

An additional item, although not raised by the Appellant as a basis of appeal, must be addressed. In cases involving the use or addiction to dangerous drugs, when the respondent provides evidence of cure, the Administrative Law Judge should make a finding of whether satisfactory proof of cure has been shown.

Hearings concerning the suspension or revocation of merchant mariner's documents and licenses must be conducted following the procedures outlined in the Administrative Procedure Act, 5 U.S.C. §§ 551-559. 46 U.S.C. § 7702(a). The Administrative Procedure Act provides that "[a]ll decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of -- (A) findings and conclusions, and

the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ."

5 U.S.C. § 557(c). In an effort to show satisfactory proof of cure, the Appellant provided unsworn comments and also presented a document indicating his participation in a rehabilitation program. These are referred to in the Administrative Law Judge's "Supplemental Findings." [D&O at 3-4]. Because the Appellant proffered evidence about satisfactory proof of cure and a showing of satisfactory proof of cure is necessary under 46 U.S.C.

§ 7704(c) to permit an Administrative Law Judge to sanction something less than revocation, appropriate findings and a conclusion regarding whether or not satisfactory proof of cure was shown are appropriate. Although the Administrative Law Judge did opine that cure was not shown, he did not make any finding or conclusion regarding whether the Appellant had presented satisfactory proof of cure nor fully articulate the reasons for that opinion. [D&O at 4].

Because it is apparent that the Administrative Law Judge found that satisfactory proof of cure was not shown, and my de novo review of the record reaches the same conclusion, I am correcting this omission of the Administrative Law Judge, sua sponte. 5 U.S.C. § 557(b); Appeal Decisions Nos. 2275 (ALOUISE); 1813 (JEWELL). For the aforesaid reasons, I find that the Appellant did not present satisfactory evidence of cure. This finding is based on the criteria I have articulated in SWEENEY, supra, and the lesser standard applied by the Administrative Law Judge.

VI

One additional item, also not raised on appeal, is the Appellant's documentary "evidence" of cure. The Administrative Law Judge should have entered the Appellant's document showing his rehabilitation progress.

Although parts of Appellant's document were read into the record by the Administrative Law Judge, it was never entered in evidence. Because the Appellant was represented pro se, if the Appellant did not make the appropriate motions, the Administrative Law Judge should have identified and entered the document in evidence on his own motion, naturally considering objections to such by the Appellant or Investigating Officer. See, 46 C.F.R. § 5.537(c). Additionally, before a document should be considered by an Administrative Law Judge, it should be admitted in evidence. Appeal Decision No. 2185 (JONES). However, as all relevant passages were apparently read into the record, and this issue was not raised on appeal by the Appellant's professional counsel, this omission is harmless error and does not constitute grounds for a remand.

CONCLUSIONS

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The Appellant did not present satisfactory proof that he has been cured of the use or addiction to dangerous drugs, i.e., marijuana.

With the exception of the absence of the entry of Appellant's document regarding his drug rehabilitation program into evidence, the hearing was conducted in accordance with applicable laws and regulations. The failure of the Administrative Law Judge to enter Appellant's document into evidence was harmless error.

ORDER

The decision of the Administrative Law Judge dated November 19, 1991, as modified by my supplemental findings and conclusions, and the reasoning therefore in this Decision, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

J. W. Kime
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 6th day of May, 1994.